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HAROLD B. WILLEY, C

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

M & M TRANSPORTATION COMPANY AND STONE'S EXPRESS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Massachusetts

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MOTION TO AFFIRM ON BEHALF OF ST. JOHNSBURY TRUCKING COMPANY, INC., AND HINSCH TRANSPORTATION CO., INC., INTERVENERS

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August 20th, 1955.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appellees, St. Johnsbury Trucking Company, Inc., and Hinsch Transportation Co., Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court in this action be affirmed, because

the questions presented by this appeal "are so unsubstantial as not to need further argument". (Rule 16, 1(c)).

This is a direct appeal from the final judgment, entered on January 14, 1955, by a specially-constituted District Court of three judges convened pursuant to Section 2284, Title 28, United States Code, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated April 5, 1954 (60 M.C.C. 129), in Docket No. MC-F-5080, *Harry D. Zabarsky, et al.—Control—St. Johnsbury Trucking Company, Inc.—Purchase—Hinsch Transportation Co., Inc.* The notice of appeal herein was filed on March 11, 1955, and the Appellants' Jurisdictional Statement was served on July 23, 1955.

STATEMENT OF THE CASE

The Commission's order, entered in a proceeding under Section 5(2)[1] of the Interstate Commerce Act

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[1] 49 U.S.C. Section 5(2). Pertinent provisions of this section of the statute are as follows:

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has

granted a joint application filed November 27, 1951, by St. Johnsbury Trucking Company, Inc., of St.

control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a) the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Johnsbury, Vt., hereinafter termed "St. Johnsbury", and Hinsch Transportation Co., Inc., of New York, N. Y., hereinafter termed "Hinsch", whereby the two motor carriers jointly applied for the Commission's approval of the acquisition by St. Johnsbury of the operating rights of Hinsch for $75,000.00. St. Johnsbury, under appropriate certificates of public convenience and necessity from the Commission, operates as a common carrier by motor vehicle of general commodities, with certain exceptions, over regular routes, between Boston and Springfield, Mass., on the one hand, and, on the other, numerous points and places in Massachusetts, Vermont, New Hampshire and Maine; and over irregular routes between points in Vermont on the one hand, and, on the other, points in Rhode Island, Massachusetts, Connecticut and the New York metropolitan area. Hinsch is authorized to operate as a motor common carrier of general commodities, with certain exceptions, over regular routes between the New York metropolitan area, on the one hand, and, on the other, the Boston and Springfield, Mass., metropolitan areas serving numerous intermediate points on these routes.

As pointed out by the District Court, an extended hearing was held at which many competing carriers throughout the New York to Maine area appeared to protest the proposed acquisition.[2]

After hearing before an examiner of the Commission, and service of his proposed report, in which the application, in part, was recommended for approval, the majority of Division 4, Commissioner Johnson

[2] At these hearings a total of 1,652 pages of testimony and 52 exhibits were introduced and received by the Commission, all of which were part of the record in the District Court.

dissenting, denied the application (59 M.C.C. 419). Upon petition for reconsideration, the entire Commission issued a report on January 19, 1954, in which it approved the acquisition, subject to certain restrictions (59 M.C.C. 747). Petitions for reconsideration of the decision of the entire Commission were filed by certain protestants in February, 1954; as a result of which, the Commission, on March 15, 1954, reopened the proceeding and on April 5, 1954, issued a second report on reconsideration (60 M.C.C. 129) modifying the initial restrictions contained in the report of January 19, 1954.[3]

The finding of the Commission that the joint application should be approved as "consistent with the public interest" under Section 5, was based upon extensive subsidiary findings which the District Court held "clearly meet the requirements established under the statute." (128 F. Supp. 296, 299). These subsidiary findings included increased efficiency in operations as a result of the acquisition, because previous interchange arrangements on truck load and less than truck-load freight had not been satisfactory; that approval of the acquisition would afford a balanced operation in that Hinsch had a preponderance of

[3] On December 18, 1951, the Commission granted St. Johnsbury temporary authority under 49 U.S.C. Section 210a (b) to operate the Hinsch rights for a period of 180 days; this temporary authority was later extended and the District Court held that the extension beyond 180 days was an invalid exercise of authority by the Interstate Commerce Commission. (*Stone's Express, Inc* v. *United States*, 122 F. Supp. 955). Appeals to the United States Supreme Court from this decision were taken by the Commission, No. 9, October Term, 1955, and by St. Johnsbury and Hinsch, No. 14, October Term, 1955. A joint suggestion as to the mootness of this issue has been filed in this Court by all parties in the belief that the disposition of the instant case will make the Stone's Express, Inc., supra, case moot.

northbound traffic and St. Johnsbury a preponderance of southbound traffic; substantial operating and administrative economies, through the elimination of circuitous operations, unnecessary administrative personnel, and duplicate terminals and other facilities, would result. These efficiencies in operation would not impose any material increased operating cost upon the efficiently-managed business of St. Johnsbury. (59 M.C.C. 747 at 753).

The Supreme Court has recognized that it is a proper function of the Commission in administering the Interstate Commerce Act to take all possible steps to avoid waste in all matters affecting transportation.[4]

The Commission further found that the resulting increase in St. Johnsbury's fixed charges arising from the approval of the acquisition would not be contrary to the public interest because of St. Johnsbury's sound financial condition (59 M.C.C. 757). The Commission also found that with approval of the acquisition, more prompt handling of shipments would follow; a more comprehensive overnight through service would be available between all of New England and the New York metropolitan area; and that a single line service resulted in more efficient operations than interchange arrangements. (59 M.C.C. 747 at 754).

The reasonableness of the purchase price was thoroughly considered by the Commission and found not excessive; that while approval of the acquisition might have some effect upon competing carriers by

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[4] This Court has described that a "primary aim" of policy in transportation regulation, is "to secure the avoidance of waste. That avoidance as well as the maintenance of service is viewed as a direct concern of the public." *Texas* v. *United States*, 292 U.S. 522, 530.

reason of the fact that St. Johnsbury was a successful carrier and would become an efficient competitor, such did not preclude approval. In fact most of the protestant carriers had increased operating revenues and larger net incomes since 1948. It did not appear that they had lost or would lose sufficient traffic to affect their operations materially. The available traffic was ample to support continuance of the St. Johnsbury-Hinsch joint operations, as well as the operations of protestants (59 M.C.C. 747 at 758-59).

The District Court carefully reviewed the evidence to support these findings; determined that the record contained "conflicting evidence" which it was the province of the Commission, and not that of the court, to weigh; and found that "with one exception" the Commission's basic findings were supported by substantial evidence on the whole record.[5] (128 F. Supp. 296, 302).

The District Court further observed, "It is not possible here to hold that the statute 'consistent with the public interest' requires the basic findings urged by the petitioners." (128 F. Supp. 296 at 301).

[5] The one finding that the District Court stated to be without substantial support, is not specified in its opinion, and the Court added "We have not the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different." This holding appears to be in accord with the decision of this Court in *Int. Com. Comm.* v. *Louis. & Nash. R.R.*, 227 U.S. 88, 98, where the Court said:

> • • • For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.

It is submitted that these conclusions of the District Court were plainly correct and that this appeal presents no questions of substance warranting further review by this Court.

ARGUMENT

(a) Appellants Are Seeking a Second Review of the Evidence

Appellants disagree with the above holdings of the District Court and seek to have this Court reexamine the record to determine whether the District Court was correct.

This Court has indicated its attitude toward such requests. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In that case the Supreme Court spelled out the proper standard of review of administrative orders, and then continued (pp. 490-91):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

See also *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498; *Radio Corporation of America* v. *United States,* 341 U.S. 412. In *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395, at page 410, this Court reaffirmed its prior statement that it "is not the place to review a conflict of evidence nor to reverse a Court

of Appeals because were we in its place we would find the record tilting one way or the other, though fair-minded judges could find it tilting either way."

This Court also noted that the rule had special application to cases where "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case"—a statement equally applicable to the statutory standard in Section 5(2)(b) of the Act of what is "consistent with the public interest."

Examination of the opinion of the District Court shows that it neither misapprehended nor misapplied the standard of review established by this Court in the *Universal Camera* case.

In the *Universal Camera* case this Court (making it clear that it was speaking of the standards set by the Administrative Procedure Act generally as well as by the Labor Management Relations Act, see 340 U.S. 474, at pp. 487, 490) emphasized the responsibility of a court called upon to enforce or set aside an administrative order. "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." 340 U.S. 474, at 490. What the reviewing court should do was clearly set forth (*id.* at 487-488):

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence

> must take into account whatever in the record fairly detracts from its weight . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The District Court opinion involved herein demonstrates that the Court was proceeding in the light of the *Universal Camera* case, and fully understood the standards which it established. The District Court correctly added that although the evidence was "conflicting", it was the province of the Commission to weigh that evidence and not that of the Court; and found that "with one exception" the Commission's basic findings were supported by substantial evidence on the whole record.

It would appear that the District Court not only correctly comprehended its duty and function, but also properly discharged them.

(b) Affirmance Per Curiam Herein Would be in Harmony With Prior Action of This Court in Cases Involving Similar Legal Principles

Decisions of this Court in recent years have consistently affirmed by *per curiam* orders, decisions of the Interstate Commerce Commission involving motor carrier operations under the "grandfather" clause, "public convenience and necessity" sections, and acquisition provisions of Sections 206(a), 207(a), and 5(2)(b) of the Interstate Commerce Act [49 U.S.C. Secs. 306(a)(1); 307(a); and 5(2)(b)]. Among those decisions, all *per curiam*, are:

Crichton v. *United States*, 323 U.S. 684;
Jack Cole Co., Inc. v. *United States*, 324 U.S. 822;
Howard Hall Co., Inc. v. *United States*, 328 U.S. 818;
Motor Haulage Co., Inc. v. *United States*, 331 U.S. 784;
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O. C. Wiley & Sons, Inc. v. *United States*, 338 U.S. 902;
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Newtex Steamship Corp. v. *United States*, 344 U.S. 901;
Malone Freight Lines v. *United States*, 344 U.S. 925;
Herrin Transportation Co., Inc. v. *United States*, 344 U.S. 925;
Luckenbach Steamship Co., Inc. v. *United States*, 347 U.S. 984, and
Pomprowitz v. *United States*, 348 U.S. 803.

Most of the points[6] urged by appellants in their

[6] Appellants failed to include within their "Notice of Appeal", as required by Rule 10(2)(c) of the Revised Rules of the Supreme Court, the alleged error by the District Court in failing to hold

notice of appeal and in their jurisdictional statement have been dealt with by this Court in the opinions cited.

(c) There Was No Procedural Error in the Commission's Conduct of the Case

1. Appellants argue (Jurisdictional Statement, p. 19) that the Commission erred in that the whole record, including the transcript of the hearings and exhibits, the reports of the examiner and Division 4, were not read, reviewed and considered by each and every member of the Commission before rendering their final decision. The objection recited above was not brought to the attention of the Commission before this action was instituted. The established rule of "primary administrative jurisdiction" requires that all controversies be thrashed out in the first instance before the administrative body in advance of attempted judicial review of its action. When the administrative process is completed the judicial power of the court begins and not before. *Nelson* v. *First National Bank,* 43 F. (2d) 30. In their petition for reconsideration and other relief, filed February 11, 1954, appellants herein sought reconsideration, oral argument, modification of the effective date, and vacatur of the Commission's order of January 19, 1954; but the contention that each and every member of the Commission had not reviewed the entire record prior to the entire Commission's decision of January 19, 1954 was not argued. Therefore it merits no consideration at this time by this Court. *Far Eastern Conference* v. *United*

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that the phrase "consistent with the public interest" requires an affirmative and basic finding that the proposed unified motor carrier service will be responsive to the transportation needs of the public. Regardless of this failure to comply with the cited Rule, this question is considered herein.

States, 342 U.S. 570, 574; *United States* v. *Tucker Truck Lines,* 344 U.S. 33; *General Transportation Company* v. *United States,* 65 F. Supp. 981, affirmed *per curiam,* 329 U.S. 668.

Furthermore this issue was argued separately and decided by the District Court by order of September 27, 1954, refusing to uphold the contention. No appeal to this Court was separately taken from that order.

(d) The Commission's Findings Were, as Held by the District Court, Entirely Adequate and Supported by Substantial Evidence

2. Appellants contend (Jurisdictional Statement, page 3) that the Commission failed to make adequate and basic findings required by the Interstate Commerce Act, and that such findings as made were not supported by substantial evidence.

It has been shown earlier herein that the findings of the Commission were held by the District Court to be entirely adequate (128 F. Supp. 296, 302).

The latitude that the Commission may exercise in the making of findings to support its decisions within the limits of the duty imposed upon it has been clearly explained and set forth by decisions of this Court. See *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216, 227, 228.

That the Commission has even broader discretionary powers in deciding Section 5 matters than it has under other sections of the Act has been recognized and commented upon in decisions of the courts. For example, in *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542 (affirmed *per curiam,* 338 U.S. 902), Judge Dobie stated in connection with a Section 5 case at page 545:

> It has been often recognized that Section 5 confers broader authority and greater administrative discretion than most any other section of the Act, and that the legislative history of the recent amendments to this section of the Act show Congressional intent to broaden the authority of the Commission. We are accordingly, of the opinion that the Commission's report and order, approving the transfer upon terms and conditions found to be just and reasonable and consistent with the public interest, should not be set aside.

Affirmance of this view is found in *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 82, wherein the Court stated:

> It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than Section 5 of the Interstate Commerce Act. Under that section, the Commission may approve any merger, purchase, consolidation, lease, or contractual arrangement affecting motor carriers which it finds will be "consistent with the public interest". Moreover, except where rail carriers are involved, transactions within the scope of Section 5 may be approved by the Commission without a hearing. In the instant case, however, a public hearing was held at which the parties exercised the rights given them to introduce testimony and to examine witnesses.
>
> With regard to judicial review of the decisions and orders of the Commission, it is well settled that the court's function is exhausted where there is found to be a rational basis for the conclusions reached by that administrative body. *Mississippi Valley Barge Line Co.* v. *U. S.,* 292 U.S. 282, 54 S. Ct. 692, 78 L. Ed. 1260; *Rochester Telephone Corp.* v. *U. S.,* 307 U.S 125, 59 S. Ct. 754, 83 L. Ed. 1147. As was stated by the Supreme Court in

Alton R.R. Co. v. *U. S.*, 315 U.S. 15, 23, 62 S. Ct. 432, 437, 86 L. Ed. 586:

> The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts.

See also *McLean Trucking Co.* v. *United States*, 321 U.S. 67, at 87, a Section 5 case, where this Court said:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment, and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that Commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest." Cf. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U.S. 452; *Pennsylvania Co.* v. *U. S.*, 236 U.S. 351; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Purcell* v. *United States*, 315 U.S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order.

Appellants erroneously argue, without supporting authority, that Section 5(2)(b) of the Interstate Commerce Act [49 U.S.C., Section 5(2)(b)] requires an affirmative and basic finding that the proposed unified motor carrier service will be responsive to the transportation needs of the shipping public; in other words, must satisfy a "public need". The District Court adequately resolved this argument in distinguishing between the statutory language found in Section 5 and the "public convenience and necessity" sections of the Act. (128 F. Supp. 296 at 301). Moreover, the Commission reviewed and summarized the evidence of representatives of shippers in its decision on reconsideration (59 M.C.C. 747 at 757). The Commission further found that the acquisition by St. Johnsbury would not materially affect appellants' operations. (59 M.C.C. 747 at 758).

It has been heretofore disclosed that the District Court concluded that all the important basic findings made by the Commission were supported by substantial evidence on the whole record; and the sole finding of fact mentioned by the majority and concurring opinions, as not having substantial support, does not warrant "marching the king's men up the hill and then marching them down again." (129 F. Supp. 296 at 302).

The Congress of the United States enacted Federal motor carrier legislation in 1935, and since that time the Interstate Commerce Commission has considered a vast number of proceedings under Section 5(2)(b) of Part I of the Interstate Commerce Act, and its predecessor Section 213 of the Motor Carrier Act of 1935 (49 U.S.C. Section 5(2)(b), Section 313 (Repealed by Transportation Act of 1940, 54 Stat. 924). Criteria

for the exercise of the administrative authority in the disposition of these cases by the Commission has been established clearly by the Courts. See cases cited at page 11 of this motion. The Commission patently acted herein within the boundaries of these decisions.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the District Court is correct, and that the alleged questions Appellants desire to present to this Court are so unsubstantial as not to need further argument. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

S. HARRISON KAHN,
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St. Johnsbury Trucking Company,
and Hinsch Transportation Co. Inc.,
Interveners.

August 20th, 1955.

Certificate of Service

I hereby certify that I have served a copy of this motion upon the following Counsel of record by depositing a copy of this motion in the United States mail, this 20th day of August, 1955, with first-class

postage prepaid, addressed to each Counsel at his post office address:

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355812—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 265

M & M TRANSPORTATION COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, the United States and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment, entered January 25, 1955 by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, which dismissed a complaint seeking to set aside an Interstate Commerce Commission order authorizing one motor carrier to acquire the operating rights of another. Appellants are competing motor carriers.

The Commissioner's order, entered in proceedings under Section 5 (2) of the Interstate Commerce Act, authorized St. Johnsbury Trucking Company ("St. Johnsbury") to purchase the operating rights of Hinsch Transportation Company ("Hinsch"). *St. Johnsbury Trucking Co.-Pur.-Hinsch Transp. Co.*, 59 M. C. C. 747. St. Johnsbury proposed to combine its established operating authority to carry general commodities over regular routes between Northern New England and Boston and Springfield with Hinsch's authority to carry these commodities between the latter cities and New York, so as to provide scheduled overnight through service between Northern New England and New York.

The Commission found, as required by Section 5 (2) (b), that the acquisition was "consistent with the public interest" and that the resulting operations "would clearly be to the advantage of the shipping public" (pp. 758, 759). These ultimate findings rested on the following subsidiary findings, among others: that St. Johnsbury's existing interchange of freight at Boston was unsatisfactory (p. 753); that the combination of Hinsch's predominantly northbound traffic with St. Johnsbury's predominantly southbound traffic would produce a balanced operation and would effect substantial operating and administrative economies (p. 753); that Hinsch's operations, while less than the maximum authorized by its certifi-

cate (p. 757) were "commensurate with its ability, resources, and facilities" and produced "substantial gross operating revenues" of over $200,000 annually (p. 758); that the overnight through service proposed was responsive to shippers' requests (p. 757); and that the purchase price was reasonable (p. 757). The Commission noted the possibility that St. Johnsbury's greater efficiency and aggressiveness would make it "a more formidable competitor" (p. 758), but concluded that material harm to competing motor carriers was unlikely in view of the facts that (1) net incomes of the latter had increased during 1948 to 1951, and (2) the volume of available traffic was sufficient to support those carriers' operations and St. Johnsbury's proposed operations (p. 759).

On appeal the district court, in a careful opinion by Circuit Judge Magruder, affirmed the Commission's order. The court held (Jurisdictional Statement, pp. 28–30) that the statutory finding of consistency with the public interest was adequately supported by the Commission's underlying findings, and that "all the important basic findings made by the Commission are supported by substantial evidence on the whole record" (*id.*, p. 33). The court held that, contrary to appellants' contention, the statute did not require affirmative findings that a public need existed for the unified service, that existing service was inadequate, and that no new service was created (*id.*, pp. 30–31).

ARGUMENT

1. Appellants' principal contention (Jurisdictional Statement, pp. 10–18) is that the Commission's underlying findings are insufficient to support its ultimate finding that the acquisition will be "consistent with the public interest." Specifically, they contend (Jurisdictional Statement, pp. 10–12) that under Section 5 (2) (b) the Commission may not find "consistency with the public interest" unless it affirmatively finds that there is a public need for the proposed combined service. We submit, however, that the Act does not require the Commission to find public need in order to approve an acquisition as "consistent with the public interest."

The Act carefully distinguishes between "consistent with the public interest" and "public convenience and necessity," and the concepts obviously are not the same.[1] "Public convenience and necessity" is the standard prescribed for the issuance of new certificates of operating authority under Section 207, and in order to satisfy that standard the Commission *is* required to find public need, *i. e.*, that the existing service is inadequate.

[1] Contrary to appellants' contention (Jurisdictional Statement, pp. 9–10), the court did not construe "consistent with" the public interest to mean "not inconsistent" therewith. The court specifically pointed to a number of Commission findings which showed that the public would benefit from the acquisition, and that serious injury to competitors was unlikely (Jurisdictional Statement, pp. 28–30).

Appellants concede (Jurisdictional Statement, p. 16), as indeed they must in light of *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86, that the Commission is not required to find that the existing service is inadequate in order to approve an acquisition under Section 5 (2) (b). This being so, we submit that both the Commission and the district court correctly construed that Section as requiring only a showing that the public will benefit from the proposal, and that such public benefit outweighs any probable injury to competing carriers. As we have noted (*supra,* pp. 2–3), the Commission here made precisely those findings, and they were sufficient to support its ultimate finding that the acquisition is "consistent with the public interest."[2]

Appellants suggest (Jurisdictional Statement, pp. 13–14) that the Commission is required to find that "there will be no adverse effect on competing carriers." But any acquisition which results in strengthening one carrier inevitably

[2] Appellants argue (Jurisdictional Statement, pp. 11–12) that the Commission departed from its prior settled construction of the Act that "need" must be shown in order to approve an acquisition. But, as Judge Magruder pointed out (Jurisdictional Statement, p. 31), the *Pacific Intermountain* case upon which appellants rely was modified on reconsideration, and its scope was still further restricted by a subsequent Commission decision. In any event, it is settled that an otherwise valid agency order is not invalid merely because it is inconsistent with other agency decisions. See cases cited by Judge Magruder, Jurisdictional Statement, p. 31.

will have some adverse effect on competitors. All that the Commission is required to do is to weigh the extent of such adverse effect against the benefit to the public. *Cf. McLean Trucking* case, *supra,* pp. 87, 88; *Baltimore Transfer Co.* v. *Interstate Commerce Commission,* 114 F. Supp. 558 (D. Md.), affirmed, 346 U. S. 890, rehearing denied, 347 U. S. 908. Here the Commission did just that, and concluded that although St. Johnsbury would probably be "a more formidable competitor" after the acquisition, competing carriers were unlikely to sustain material harm because of their own strong financial position and the sufficiency of available business. The Commission then balanced these facts against the improved service which would result, and concluded that the public interest would be served by approving the acquisition. The Act does not require the Commission to do anything more.

2. In holding that "all the important basic findings" of the Commission are "supported by substantial evidence on the whole record," the court noted that one finding, which it did not identify, "appears to be without substantial support" (Jurisdictional Statement, p. 33). The court stated (*ibid.*), however, that it did not have "the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different," and further stated that even without that one "questionable

finding" it would uphold the order. Appellants admit (Jurisdictional Statement, p. 18) that the absence of substantial evidence to support an immaterial finding will not invalidate the order, but they contend that since the finding was not identified it is impossible to determine whether it was immaterial. However, since the court held that all the "important" findings were supported by substantial evidence, it plainly viewed the single unsupported finding as immaterial. Under such circumstances, it properly upheld the order, since even "without such findings, there would still be a basis in the record for the Board's [Commission's] conclusions." *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241, 247.

3. Finally, appellants argue (Jurisdictional Statement, pp. 19–21), that the court erred in quashing their requests for admissions that the Commissioners had not read, reviewed and considered the whole record. Appellants' complaint in the district court contained such an allegation, and the Commission's answer admitted that the Commissioners had not read the record, but denied that it had not been reviewed and considered.

Clearly, it was not incumbent upon each of the individual Commissioners to read the whole record himself; he properly could have the evidence "sifted and analyzed by competent sub-

ordinates." *Morgan* v. *United States*, 298 U. S. 468, 481. The Commission's report stated that it was based "[o]n the record presented," and the Commission denied the charge that it had not "reviewed and considered" the whole record in reaching its decision. To permit appellants further to examine into the "extent to which the Secretary [Commissioners] examined the evidence," *Morgan* v. *United States*, 304 U. S. 1, 18, would constitute the same kind of "prob[ing of] the mental processes" of an agency which this Court condemned in the fourth *Morgan* case as disrespectful of the "integrity of the administrative process." *United States* v. *Morgan*, 313 U. S. 409, 422. Courts repeatedly have rejected such attempts by litigants to inquire into the internal workings of administrative agencies,[8] and the court below properly rejected appellants' attempt to do so in this case.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore

[8] *E. g.*, *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676 (C. A. 9); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39 (C. A. 3); cf. *Norris & Hirshberg* v. *Securities and Exchange Commission*, 163 F. 2d 689 (C. A. D. C.); *National Labor Relations Board* v. *Ford Motor Co.*, 118 F. 2d 766 (C. A. 9).

respectfully submitted that the judgment of the district court should be affirmed.

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M & M TRANSPORTATION COMPANY and STONE'S EXPRESS, INC.,

Appellants,

against

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Appellees,

and

ST. JOHNSBURY TRUCKING COMPANY, INC. and HINSCH TRANSPORTATION CO., INC.,

Intervener Appellees.

On Appeal from the United States District Court for the District of Massachusetts

REPLY TO THE MOTIONS TO AFFIRM

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REPLY TO THE MOTIONS TO AFFIRM

Appellants submit this brief, pursuant to Rule 16(3) of the Revised Rules of the Supreme Court of the United States, in opposition to the motions to affirm filed by Appellees and Interveners herein.

I

"Public need" and "adequacy of existing service" are separate and distinct concepts.

The Appellees contend (Appellees' Motion to Affirm, pp. 4-5) that a finding of "public need" is not a prerequisite for approval of an application under Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. 5(2)(b)). This argument is grounded upon a specious syllogism. For their major premise, Appellees define "public need" to mean "inadequacy of existing service".[1] For their minor premise, Appellees rely upon the decision by this Court in *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86, that the Commission need not find that existing service is inadequate in order to approve an application under Section 5(2)(b). *Ergo,* say the Appellees, the Commission need not find public need in order to approve a Section 5(2)(b) application.

Plainly, the major premise is fallacious. In *Interstate Commerce Commission et al.* v. *Parker, etc.,* 326 U. S. 60, 69-70, this Court recognized a distinction between "public need" and "adequacy of the existing service". The Commission, too, has consistently treated "public need" and "adequacy of existing service" as two separate and distinct concepts. Thus, in *Pan-American Bus Lines Operation,* 1 M. C. C. (F) 190, 203, the Commission delineated three essential findings in a Section 207 case:

> "* * * new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers. * * *"

[1] Appellees state (Motion to Affirm, p. 4) "public need, i.e., that the existing service is inadequate."

See, too,

Kansas City S. Transport Company, Inc., Common Carrier Application, 10 M. C. C. 221, 234-238.
White Circle Line, Common Carrier Application, 16 M. C. C. (F) 516.

The significant facts are these: the Interstate Commerce ommission has defined "public need" as "public demand" nd has consistently held that a proposed service will not tisfy the statutory criteria unless it "will serve a useful ublic purpose, responsive to a public demand".[2]

The statutory scheme is obvious. In a Section 207 case, e Commission must affirmatively find all of the following cts: (1) public need; and (2) inadequacy of existing rvice of the same kind as applicant proposes; and (3) sence of adverse effect on competing carriers.

In a Section 5(2)(b) case, the Commission must affirmaely find only one fact: public need for the service. It ed not *find,* though it must *weigh,* the "considerations" t forth in Section 5(2)(c) of the Act, i.e., adequacy of isting service, among other things. Hence, if the Comssion weighs the described "considerations" and makes findings as to adequacy of existing service, or indeed, ls to find that existing services are inadequate it may, vertheless, approve a Section 5(2)(b) application so long there is a public demand or need for the proposed service.

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[2] As the Jurisdictional Statement (pp. 11-12) points out, the prinle enunciated in *Pacific Intermountain Express Co.—Control and rchase—Keeshin Freight Lines, Inc. etc.,* 57 M.C.C. (F) 341 d, 57 M.C.C. (F) 467 was never modified. The appellees' statent (Motion to Affirm, p. 5) that the scope of this decision was ther restricted in a subsequent decision is clearly wrong. See, *D. Gorman—Control; Chicago Express, Inc.—Purchase—Huck's nsfer, Inc.,* 58 M.C.C. 812 (no printed report) in which the Comsion said that there must be substantial evidence of public need upport an order approving an application under Section 5(2)(b). eed, the National Transportation Policy (54 Stat. 899) describes he principal objective of regulation a transportation system "adee to meet the needs of the commerce of the United States * * *."

This is so because Section 5(2)(b) does not require that existing carriers be accorded an opportunity to provide the proposed service even though they are in a position to do so. On the other hand, in a Section 207 case, if existing facilities are adequate, the competing carriers must be accorded the right to provide the proposed service if the evidence shows that such carriers are "in a position to render this complete service." *Interstate Commerce Commission* v. *Parker,* 346 U. S. 60, 69.

The distinction between "public convenience and necessity" and "consistent with the public interest" was drawn by the Commission in *Baggett Transportation Company—Purchase—Bishop,* 36 M.C.C. 659, 663-664; when the Commission said:

> "Section 206 provides the exclusive method and the sole standards by and under which we may issue a certificate. The primary standard there established is the existence of public convenience and necessity. The standard for our approval of a transaction under section 5 is consistency with the public interest. The one is not necessarily the equivalent of the other. Public convenience and necessity, as we have frequently defined it, ordinarily requires a higher degree of proof than mere consistency with the public interest, and usually contemplates an entirely distinct set of circumstances."

One thing is clear: while "consistency with the public interest" does not require the character or quantum of proof requisite in a Section 207 case, both sections of the law require an affirmative finding, supported by substantial evidence, of "public need."

Appellees suggest (Appellees' Motion to Affirm, p. 5) that "a showing that the public will benefit from the proposal" is the sole standard applicable in this case. If that be so, then the Commission's order must be vacated because there was neither a finding to that effect nor any evidence

to support such a finding. The appellees' attempted distinction between "public need" and "public benefit" is a fruitless exercise in logomachy.[3]

II

All of the errors were properly urged before the Commission.

Appellant will deal briefly with only the most important errors of law and fact which characterize Interveners' Motion to Affirm.

Interveners' charge (Interveners' Motion to Affirm, pp. 11-12) that appellants' Notice of Appeal is deficient is answered by the language of Questions 2, 3 and 5.

Appellants never urged the contentions ascribed to them by Interveners (Interveners' Motion to Affirm, pp. 13-15). Appellants have argued, and again insist, that the Commission exceeded "the statutory limits within which Congress confirmed its discretion" and its findings "are not adequate and supported by evidence." *McLean Trucking Company, Inc.* v. *United States,* 321 U. S. 67, 87.

Appellants did seasonably urge the objection that the record was not read, reviewed and considered (Interveners' Motion to Affirm, p. 12). Not only did appellants' petition for reconsideration charge a violation of the Administrative Procedure Act, but implied that only the failure to read, review and consider the whole record could justify the decision (pp. 6 and 10 of Petition for Reconsideration). In any event, this objection cannot be waived. It is not a mere procedural irregularity.

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[3] Appellees' statement (Appellees' Motion to Affirm, p. 5) that Section 5(2)(b) requires "only a showing * * * that such public benefit outweighs any probable injury to competing carriers" is clearly incorrect. This is merely the fourth factor in a Section 207 case which the Commission added in *All American Bus Lines, Incorporated,* Common Carrier Application, 18 M.C.C. (F) 755, 777.

If it is unreasonable or even shocking to expect the Commission to read, review and consider the records before it, relief must be sought in Congress and not legislated by the Commission or even the Courts. Cooper, "Administrative Law: Let Him Who Hears Decide," 41 ABAJ 705.

Interveners' statement (Interveners' Motion to Affirm, p. 13) that review on this issue is foreclosed by failure to appeal from the order of the District Court quashing appellants' notice to admit, reveals a failure to recognize a non-appealable intermediate order.

CONCLUSION

For all of the reasons urged in the Jurisdictional Statement and this Reply, the Motions to Affirm should be denied.

Respectfully submitted,

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September 9, 1955.